Supreme Court, U. S.
FILED
JUN 30 1976
MICHAEL RODAK, JR., CLERK

No. 75-1900

In the Supreme Court of the United States

OCTOBER TERM, 1975

CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO,

Petitioner,

vs.

STATE OF ILLINOIS ex rel. RICHARD K. LIGNOUL, Commissioner of Banks and Trust Companies, State of Illinois,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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SORG/CHICAGO U.S.A.

INDEX

TABLE OF AUTHORITIES

Cases:

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Continental Illinois National Bank and Trust Company of Chicago petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, is appended as Appendix A. The unreported opinion of the United States District Court for the Northern District of Illinois is appended as Appendix B.

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on May 27, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

To what extent, if any, does the operation of electronic funds transfer machines by national banks off their premises constitute branch banking within the meaning of 12 U.S.C. § 36(f).

STATUTES INVOLVED

Federal Statutes:

12 U.S.C. § 36(f)
12 U.S.C. § 36(c)

Illinois Statutes:

Ill. Rev. Stat. ch. 16½, § 102 (1975)
Ill. Rev. Stat. ch. 16½, § 105(11) (1975)
Ill. Rev. Stat. ch. 16½, § 106 (1975)

The relevant statutes are cited in full in Appendix C.

STATEMENT

Electronic funds transfer or "EFT" is a rapidly evolving new segment of the national payments mechanism made possible by adapting modern computer and communications technologies to funds transfers. It is the most significant innovation in banking payment services since development of the checking system. EFT accelerates funds transfers and dispenses with paper and manual processing which increasingly burden the traditional paper-based payments and clearings system. EFT uses

computer tapes and electronic impulses in lieu of checks to transfer social security benefits, government and business payrolls and other high-volume, recurring payments directly to the recipients' accounts at financial institutions. More than 35 automated clearing houses—metropolitan, regional and national—are or by the end of 1976 will be in operation for clearing EFT transactions involving debits and credits between government, business, individual and other accounts maintained at different financial institutions throughout the country.

This case involves the retail aspect of this phenomenon. Electronic terminals through which individuals may be accorded direct access to their accounts at financial institutions, or give electronic directions pertaining to such accounts, are already spreading rapidly as banks, savings and loan associations ("S&Ls"), credit unions, national credit card companies, retailers and other business entities increasingly turn to such terminals to offer EFT to their customers.

Petitioner, Continental Illinois National Bank and Trust Company of Chicago ("Continental") is a national banking association organized and operating under the National Bank Act (12 U.S.C. §§ 21 *et seq.*) with its main banking premises in Chicago, Illinois. Continental has installed, at sites apart from its main banking premises, two unmanned and 62 point-of-sale ("POS") electronic terminals each connected by telephone wire to a Continental main computer located at its banking premises. The unmanned terminals are located in the city of Chicago at a railroad station and the interior mall of an office building complex; the POS terminals are located in the stores of a supermarket chain in the metropolitan Chicago area, primarily in suburbs surrounding Chicago. Through this system, activated by insertion of a customer's magnetic "key"

card into an electronic terminal (hereinafter sometimes called "CBCT"),* a customer can, among other things, withdraw funds from his savings, checking or credit card account, transfer balances between such accounts, cause funds to be credited to such account and make payments to Continental or to third parties.

Upon insertion of the "key" card in the terminal, electronic messages pass between the terminal and Continental's main computer where the requested transaction is processed. The main computer locates the customer's file and checks the identification number which the user taps in on a keyboard at the terminal against a secret identification number stored in the main computer. The customer also taps in on the keyboard information concerning the requested transaction. The eligibility of the customer to complete the transaction, bank authorization thereof, debits and credits to customer accounts and verification procedures also take place at the main computer or elsewhere at the bank. Memoranda of each transaction are delivered to the customer at the terminal. Arrangements for the customer to avail himself of EFT and the accounts and services included therein are made at the bank or by mail.

Because verification of the identity of a customer depends solely on possession of the "key" card and the user's knowledge of the customer's secret identification number, banks impose limitations on EFT withdrawals from savings, checking or credit card accounts. Continental permits one withdrawal per 24-hour period limited in amount to $100.

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* Electronic terminals (unmanned and POS) maintained by banks are known as Customer Bank Communication Terminals or CBCTs.

Unmanned terminals are operated by the customer. In addition to facilitating communications between the customer and the bank, unmanned terminals dispense cash in prepackaged $25 packets and have a drawer for insertion of cash or checks for retrieval by the bank.

POS terminals are operated by employees of the store at which they are located. When groceries or cash are delivered by the store to the customer, Continental is instructed by POS terminal to debit a specified account of the customer and credit an account of the store at Continental. Cash or checks delivered by the customer at the site of the POS terminal become the property of the store; as consideration, the store employee instructs Continental to debit the account of the store and credit a specified account of the customer with Continental.*

On June 20, 1975, the Illinois Commissioner of Banks and Trust Companies ("Illinois Commissioner") sued to enjoin Continental from maintaining these CBCTs, alleging that CBCTs are branches under 12 U.S.C. § 36(f) and are prohibited to national banks in Illinois by 12 U.S.C. § 36(c). The District Court held that unmanned or POS terminals used in connection with (i) cash withdrawals from a customer's savings and checking accounts at Con-

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* For a detailed description of Continental's CBCTs and a more complete description of EFT, see Stipulation of Facts attached as Appendix B to Brief in Support of Continental Bank's Motion for Summary Judgment in the District Court; Affidavits of William D. Plechaty attached as Appendices D and VII to Brief in Support of Continental Bank's Motion for Summary Judgment and November 12, 1975 Memorandum of Continental Bank in the District Court, respectively; and Affidavits of Dean Donald P. Jacobs attached as Appendices C and IV to Brief in Support of Continental Bank's Motion for Summary Judgment and November 12, 1975 Memorandum of Continental Bank in the District Court, respectively.

tinental, and (ii) payments of a customer's indebtedness to Continental, are not "branches" under 12 U.S.C. § 36(f). It further held that terminals, whether unmanned or POS, used in connection with (i) transfers between a customer's savings and checking accounts, or from his credit card account to his checking account, at Continental, (ii) deposits to such a savings or checking account or (iii) cash advances to a customer pursuant to an overdraft or charge-card line of credit, are "branches" under 12 U.S.C. § 36(f). The Court of Appeals held all CBCT functions to be branching under 36(f), reversing the District Court as to cash withdrawals and payments of customer indebtedness and affirming as to all other functions.

REASONS FOR GRANTING THE WRIT

At issue here is whether after a period of 150 years during which banks have been the heart of the national payments mechanism—initially through issuance of bank notes and then as the exclusive supplier of demand deposit accounts--the participation of national banks in the nation's new electronic payments mechanism can be foreclosed or restricted through application of branching laws even as to electronic funds transfer in states where this is unnecessary to preserve competitive equality between state and national banks.

The status of electronic terminals under the Federal branching laws is significant for national banks in all states. This is true not only where the state's statute law relating to state-chartered banks prohibits, or limits the number or location of, branches and expressly treats electronic terminals as branches. It is also true where the state's statute law (i) contains such a prohibition or limitation of branches but is silent as to the branch status of electronic terminals; (ii) permits statewide branching whether or not silent as to the branch status of electronic terminals; or (iii) expressly provides that electronic terminals are not branches whether or not imposing any limitations or requirements as conditions to maintaining electronic terminals.

The Federal branch banking laws impose requirements as to minimum capital and the processing of a branch application with the Comptroller of the Currency upon all facilities of national banks deemed to be branches under Federal law. 12 U.S.C. §§ 36(d), 51. Thus, even in a state under whose law CBCTs are not branches for state banks or no branch requirements are imposed on CBCTs of state banks, the Federal minimum capital and branch application requirements would apply to national bank CBCTs if deemed branches under 36(f).

Moreover, read literally, the Federal branch banking laws prohibit a national bank from establishing or operating a branch unless the establishment and operation of such a branch is permitted to state banks by the express law of the state in question. 12 U.S.C. § 36(c); see also *First National Bank of Logan* v. *Walker Bank & Trust Co.*, 385 U.S. 252 (1966) (*"Walker Bank"*). Thus, where state banks are permitted—not by statute but by administrative interpretation or enforcement practices of state banking authorities—to establish and operate facilities of a kind deemed to be branches for national banks under Federal law, the right of a national bank to establish and operate identical facilities is at least problematical under the decision below. Even if neither state nor Federal banking authorities would attempt to prevent a national bank in such a state from doing so, a competitor might initiate action.

In short, a holding that electronic terminals are branches for national banks significantly affects all national banks and the national banking system irrespective of the branch requirements, and the branch status of electronic terminals, for state-chartered banks under the law of the state where the terminals are located.

Litigation testing the applicability of the Federal branching laws to EFT services is pending or has been decided in at least 10 courts throughout the country. Although the court of appeals below, as well as the court of appeals in *Independent Bankers Ass'n of America* v. *Smith*, No. 75-1786 (D.C. Cir., March 23, 1976) (*"IBAA"*) and two district courts in other circuits,* have held elec-

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* *State of Ohio ex rel. O'Donnell* v. *Smith*, No. C-1-75-153 (S.D. Ohio, May 10, 1975); *State of Missouri ex rel. Kostman* v. *First National Bank in St. Louis*, No. 75-113 C (1) (E.D. Mo., Nov. 14, 1975), *appeal docketed*, No. 76-1056, 8th Cir., Jan. 21, 1976.

tronic funds transfer machines and all of their functions to be branching under the McFadden Act provisions of the national banking laws (12 U.S.C. § 36), two district courts have held some or all of such EFT services not to be branching thereunder.*

1. The Federal definition of "branch" in 12 U.S.C. § 36(f) (hereinafter "36(f)") provides in relevant part:

> "The term 'branch' as used in this section shall be held to include any branch bank, branch office, branch agency, additional office, or any branch place of business . . . at which deposits are received, or checks paid, or money lent."

The application of this definition to specific EFT functions of CBCTs presents novel and difficult questions of Federal banking law which, by reason of the significance of EFT to banking and the national payments mechanism, ought to be resolved by this Court.

The Federal branching laws do not expressly encompass a number of the CBCT functions, and there is no reason to stretch them to deprive the public of the benefits of the new technology.

An EFT cash withdrawal transaction is not the paying of a check under 36(f). As the District Court below held, the insertion of a card into an electronic terminal to withdraw $25 packets of cash (up to $100) from a customer's

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* *State of Oklahoma ex rel. State Banking Board* v. *Utica National Bank and Trust Company*, No. 75-C-318 (N.D. Okla., Dec. 23, 1975), *appeal dismissed per stipulation* (holding that CBCTs are not branches with respect to any of their functions); *State of Colorado ex rel. State Banking Board* v. *First National Bank of Fort Collins*, 394 F. Supp. 979 (D. Colo. 1975), *appeals docketed*, Nos. 75-1523, 75-1611, 75-1612, 10th Cir., July 17, 1975 (holding that CBCTs are not branches as to their withdrawal and cash advance functions but are branches as to their deposit function).

savings or checking account is not the payment of a check, whether viewed in the perspective of technical legal rules or common understanding. Under the Uniform Commercial Code, its antecedent, the Negotiable Instruments Law, and customary commercial usage, the distinguishing feature of a check is its transferability by a payee or holder to a third party.* In no respect does an EFT withdrawal direction, a magnetic "key" card or any other feature of an EFT withdrawal embody any property of transferability by a payee or holder.

Moreover, EFT withdrawals can be made not only from checking accounts but from bank savings accounts and, under regulations of the Federal Home Loan Bank Board, from S&L savings accounts. The Federal Reserve Board's Regulation Q prohibits checking privileges against bank savings accounts, and the Home Owners' Loan Act of 1933 provides that S&L savings accounts "shall not be subject to *check* or to withdrawal or transfer on *negotiable* or *transferable* order or authorization. . . ." 12 C.F.R. § 217.2 (1976); 12 U.S.C. § 1464(b)(1) (emphasis added).

An EFT transfer of funds between two accounts of a single customer at the bank is not receiving a deposit under 36(f). In the case of a customer's use of an electronic terminal to direct a transfer between his checking and savings accounts at the bank, or from his credit card to his checking account there, no funds pass at the terminal between the customer and the bank. The customer could achieve the same result—at greater expense to himself and the bank, but without raising any branching problems—by simply picking up the telephone and transmitting an identical direction to the bank telephonically.

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* U.C.C. § 3-104 and U.C.C. comments 2 and 6 thereto. NIL § 1.

As to EFT cash advance transactions, the use of a CBCT "key" card to obtain a cash advance through an electronic terminal cannot be meaningfully distinguished under 36(f) from the use of an ordinary bank credit card (e.g. Master Charge or BankAmericard) to obtain goods, services or cash from a merchant.* In both cases, the customer obtains a credit accommodation from and incurs indebtedness solely to his bank. The courts below and in *IBAA* attempt to distinguish an EFT cash advance from a bank credit card transaction at the place of business of a merchant on the grounds that the merchant's premises do not constitute an established place maintained by the bank furnishing the credit card services, that interest does not accrue from the date of use of a bank credit card but only if payment is not made within a specified period after billing, and that the goods, services or money delivered to the customer upon use of a bank credit card belong to the merchant, not the bank.

These distinctions do not represent substantive differences. For example: (i) If ownership or control of the terminals were a decisive consideration, POS terminals, which are limited communications devices not unlike telephones, and are operated by a merchant's employees rather than a bank customer, could as readily be owned or maintained by the merchant rather than the bank. Indeed, if the branching status of POS terminals turns on whether they are owned by the bank or the merchant, it can be safely predicted that the latter will swiftly come to own or control any POS terminals located in their stores which are connected to bank computers. (ii) POS terminals owned by banks and located in retail stores are frequently used by merchants in lieu of telephones to

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* The District Court in *State of Colorado* v. *First National Bank of Fort Collins*, 394 F. Supp. 979, 985 (D. Colo. 1975) expressly so held.

expedite communication in obtaining bank authorization of a Master Charge or BankAmericard credit card purchase.* Under the *IBAA* court's reasoning adopted by the court below, a credit card purchase as to which the merchant obtains bank authorization would not be branching if the merchant communicates with the bank via the merchant's own POS terminal or telephone but would be branching if he communicates by POS terminal owned, or telephone service paid for, by the bank.** (iii) The fact that interest does not normally accrue until a specified period after a bank credit card customer is billed in no way alters the fact that the bank extends credit to its customer at the time of a credit card purchase at a retail store, nor is there anything inherent in a bank credit card transaction which would prevent a bank or banks generally from accruing interest from the time of the transaction. (iv) As in a typical bank credit card purchase, in an EFT transaction at a POS terminal the goods or cash delivered to the bank customer belong to the merchant, not the bank.

Thus, there are at the very least, ample reasons for holding that off-premises electronic terminals are not branches under 36(f) with respect to each of the foregoing functions.

In addition, all CBCT transactions—irrespective of the function—involve multiple incidents occurring at different locations: the terminal, the main computer, the bank's

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* See Affidavit of William D. Plechaty, attached as Appendix D to Brief in Support of Continental Bank's Motion for Summary Judgment in the District Court at 11.

** Similarly an unmanned terminal owned by a national credit card company such as American Express, and available to cardholders of many banks and other financial institutions, would presumably not be a branch under the *IBAA* reasoning adopted by the court below, whereas one owned by a bank would be a branch if used by that bank's cardholders.

books and records, on bank premises when arrangements are made for electronic services or bank employees perform verification and other processing functions, and even the switching center and the telephone lines. Deciding whether each kind of CBCT transaction involves branching under 36(f) by attempting to isolate one of the several incidents of the transaction as the key or characterizing incident in order to ascribe a single location to the transaction is necessarily arbitrary and productive of fortuitous results.

Moreover, a POS terminal at the service counter of a grocery store or an unmanned terminal—each with its circumscribed functions and controlled usage—represents a limited off-premises presence for a bank. Finally, EFT —which increasingly promises to displace the traditional paper-dominated payments mechanism—is a radical innovation in funds transfer stemming from advances in technology not even remotely conceived of in 1927 when the McFadden Act was adopted.

In short, reference to the literal words of the statute is not sufficient to determine the extent to which § 36 applies to the new technology. Accordingly, it is necessary to turn to the purpose and policy of the statute to determine how broadly it should be construed.

2. The legislative history of the McFadden Act from which 12 U.S.C. § 36 derives and the decisions of this Court in *Walker Bank* and *First National Bank in Plant City* v. *Dickinson*, 396 U.S. 122 (1969) (*"Plant City"*) identify competitive equality between national and state banks competing within the state in question as the overriding objective of the McFadden Act.

As in the case of electronic funds transfer machines, each of the activities at issue in *Plant City*—an armored car messenger service, which served businesses by picking

up cash and checks for deposit and delivering currency and coin, and a stationary deposit receptacle with a locked compartment for night pouches left for retrieval by the messenger service—was an activity the status of which as a branch bank under 36(f) was certainly questionable. As in the case of electronic terminals, a messenger service or a deposit receptacle is a distinctly limited off-premises presence for a bank.*

This Court's *Plant City* opinion, after noting that Florida's statute prohibited all off-premises activities to Florida state banks,** repeatedly returns to the theme that "the purpose of the statute [the McFadden Act] is to maintain competitive equality."*** If in that case the

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*And whether deposits were received for purposes of 36(f) when the customer physically turned over the items to be deposited or when the debtor-creditor relationship arose pursuant to which the customer became entitled to draw on deposited funds presented a further uncertainty in *Plant City*.

** 396 U.S. at 130-31.

*** "On this point [whether the definition of branch in the state in question controls the content of the Federal definition as suggested by the Court of Appeals for the Fifth Circuit in the decision appealed in *Plant City*] the language of the Court of Appeals perhaps overstated the relation of state law to the problem, since the threshold question is to be determined as a matter of federal law, having in mind the congressional intent that so far as branch banking is concerned 'the two ideas shall compete on equal terms and only where the States [allow] their own institutions [to] have branches.' In short, the definition of 'branch' in § 36(f) must not be given a restrictive meaning which would frustrate the congressional intent [competitive equality between state and national banks within the state in question] this Court found to be plain in *Walker Bank*." 396 U.S. at 134.

* * *

"Because the purpose of the statute is to maintain competitive

(Footnote continued)

messenger service and receptable had not been held branches under 36(f), and national banks in Florida were thus given a competitive edge over Florida state banks, the principle of competitive equality would have been frustrated, as this Court observed.*

In contrast to *Plant City*, a decision that off-premises electronic funds transfer machines of national banks in Illinois are not branches under 36(f) will not place Illinois state banks at a competitive disadvantage. Section 5(11) of the Illinois Banking Act provides that notwithstanding any other provision of that Act, Illinois state banks shall have all powers of national banks.** Section 5(11) must be taken into account in a case where the threshold question is whether the activity is a branch at

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(Footnote continued)

equality, it is relevant in construing 'branch' to consider, not merely the contractual rights and liabilities created by the transaction, but all those aspects of the transaction that might give the bank an advantage in its competition for customers." 396 U.S. at 136-37.

* * *

"Here we are confronted by a systematic attempt to secure for national banks branching privileges which Florida denies to competing state banks." 396 U.S. at 138.

* *Ibid.*

** Section 5(11) of the Illinois Banking Act states, in relevant part, that an Illinois state bank shall have the power:

"Notwithstanding any other provisions of this Act, to do any act and to own, possess and carry as assets property of such character, including stock, which is at the time authorized or permitted to National Banks by an Act of Congress, but subject always to the same limitations and restrictions as are applicable to National Banks by the pertinent Federal law." Ill.Rev.Stat. ch. 16½, § 105(11) (1975).

all under Federal law.* This threshold question is not determined solely by reference to the state branch banking laws, for as this Court held in *Plant City:*

> "[T]o allow the states to define the content of the term 'branch' would make them the sole judges of their own powers. Congress did not intend such an improbable result, as appears from the inclusion in [Section 36(f)] of a general definition of branch". 396 U.S. at 133-34.

Plant City strongly suggests that competitive equality between state and national banks within the state in question is the dominant consideration in construing 36(f).** Section 5(11) ensures to Illinois state banks competitive parity with national banks in Illinois. The Florida statute relevant to *Plant City* contained no comparable provision.***

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* In contrast, a statute such as Section 5(11) would obviously not be relevant in a case such as *Walker Bank* where the activity at issue (there a manned full-service brick-and-mortar banking office) is clearly a branch under the Federal definition and the sole inquiry is whether and to what extent state statute law relating to branch banking affirmatively authorizes that kind of branch to state banks.

** Indeed, if the facts in *Plant City* had been precisely as they were except that the Florida Comptroller, by administrative interpretation or enforcement practice, had permitted Florida state banks to maintain messenger services and deposit receptacles of the kind at issue there, there would have been every reason to decide that the messenger service and receptacle were *not* branches under 36(f).

***At least 12 other states have statutes comparable to Section 5 (11) under which a similar issue could arise. See Ala. Code tit. 5, § 105 (1960); Alaska Stat. § 06.05.005(3)(B) (1962); Ariz. Rev. Stat. Ann. § 6-184(2) (1974); Ark. Rev. Stat. § 67-501.1(o) (Cum. Supp. 1975); Colo. Rev. Stat. Ann. § 11-2-103(e) (1974); N.J. Stat. Ann. § 17:9A-25(12) (Cum. Ann. Pocket Part 1975); N.C. Gen. Stat. § 53-43(5) (1975); N.D. Cent. Code § 6-03-02.9 (1975); Okla. Stat. Ann. tit. 6, § 203(5) (1966); S.C. Code Ann. § 8-57.1 (Cum. Supp. 1975); Tenn. Code Ann. § 45-401 (Cum. Supp. 1975); Va. Code Ann. § 6.1-5.1 (Cum. Supp. 1975).

3. The decision below and in *IBAA* misapply this Court's holding in *Plant City*. Although recognizing that *Plant City* requires that the content of 36(f) be determined by Federal law, these courts ignored the fact that the absolute prohibition under Florida state law and administrative practice of all off-premises banking activity by Florida state banks set the context for this Court's interpretation of 36(f) in *Plant City*.* They failed to recognize that in *Plant City* the maintenance of competitive equality between national and state banks in Florida was a principal consideration in giving such content to the 36(f) definition of "branch".

Insistence on an inflexible Federal definition of "branch" to be applied uniformly nationwide led the court below and in *IBAA* to depart from the principle of competitive equality underlying the McFadden Act. *Walker Bank* and *Plant City*. *IBAA* held (and it is implicit in the decision below) that even in states in which CBCTs are not treated as branches of state banks (whether by express state statute, by court decision or by administrative interpretation or practice) CBCTs are branches for national banks. In such a state, this would mean that electronic terminals of state banks are free of minimum capital and branch application requirements, but a national bank must, for each off-premises terminal maintained by it, both meet the minimum branch capital requirements set forth in the National Bank Act and process a branch application with the Comptroller of the Currency. The minimum capital requirement imposed on Continental, solely for the 62 POS terminals which it proposes to install in one supermarket chain, would be $12,400,000 although the total cost of all of these terminals is less than $100,000. Under the inflexible interpreta-

* See 396 U.S. at 130-31.

tion of 36(f) adopted by the court below, it is possible that a national bank could be foreclosed by capital requirements from participating in a substantial network of POS terminals in which state banks located in the same state could participate by express state statute.

4. Since neither the literal language of 36(f) nor the decisions interpreting it nor the principle of competitive equality is dispositive of the status under 36(f) of electronic funds transfer machines in states such as Illinois whose statutes ensure competitive parity to state banks, it is necessary to consider other relevant factors.

There is no suggestion in the legislative history of the McFadden Act of any Congressional intent to inhibit national banks from using technical improvements advantageous to the public. Modern electronic technology, and its applications to computers and to communications techniques, were not within the contemplation of Congress in 1927.

In resolving a statutory uncertainty it is proper for a court to give weight to advantages to the public and to factors bearing upon competition and the soundness of the banking system and national payments mechanism. State branch banking prohibitions are inherently anticompetitive. See *United States* v. *Citizens & Southern National Bank,* 422 U.S. 86, 118 (1975). In giving an expansive cast to the 36(f) definition of branch with respect to EFT services and thus foreclosing national banks from competing in the offering of EFT services in a state whose laws assure parity to state banks, the court below failed to accord proper weight to the national economic policy in favor of competition. Cf. *United States* v. *Philadelphia National Bank,* 374 U.S. 321, 326 (1963); *Silver* v. *New York Stock Exchange,* 373 U.S. 341 (1963). It also failed

to consider the significant potential of EFT for affording convenience to the public and containing the burden on the payments mechanism and banks of processing and clearing an ever-growing volume of paper items. Finally, it failed to consider the implications of the administrative policies of the State of Illinois as reflected in administrative interpretations and enforcement practices of the Illinois Commissioner.*

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* The Illinois Commissioner has permitted, among other things, (i) the use of bank credit cards to finance purchases at retail stores for which the retailer frequently obtains bank authorization through use of a bank-owned POS terminal maintained at the retailer's store, (ii) the dispensing by a bank to its customers of cash withdrawals and loans through use by the customer of his "key" card at remotely located unmanned terminals maintained at the banking premises of other banks and (iii) wire transfer arrangements of various kinds including one whereby an S&L offers to customers, in conjunction with an S&L account, a free checking account at a bank and effects deposits to its customer's bank account by transferring funds from the S&L's own account with such bank in the same manner as a customer deposit through a Continental POS terminal at a supermarket is effected by the transfer of funds from the store's bank account at Continental to the customer's bank account there. See letter of Bernard R. Rabens, Chief Examiner, Chicago Office, Illinois Commissioner of Banks and Trust Companies, attached as Appendix VII to November 12, 1975 Memorandum of Continental Bank in the District Court.

It is distinctly possible that one or more of the foregoing activities would be branching for a national bank in Illinois if the *IBAA* court's expanded uniform definition adopted below stands. Moreover, as EFT becomes increasingly widespread, Illinois state banks may well offer further EFT services within the broad category viewed to be branching for a national bank. As in the case of the present activities of Illinois banks described above, it is not unlikely that the Illinois Commissioner would approve or tolerate some or all of these activities. Thus, if the standard adopted by the Court of Appeals below is permitted to stand, national banks in Illinois will be at a competitive disadvantage to Illinois state banks as to any activities now or hereafter permitted to state banks which fall within such a definition.

Whether or not banks are permitted to offer EFT in Illinois, S&Ls, credit unions, national credit card companies and others will.* The McFadden Act was designed to preserve a sound banking industry within the dual banking structure, not prevent banks from competing effectively against their nonbank competitors. As recently as 1963 this Court recognized that the nation's funds transfer mechanism—then almost totally dependent on the checking system—was the exclusive domain of commercial banks.** The decision of the court below would foreclose commercial banks in Illinois, which have been among the leaders in developing the new EFT system, from competing with nonbanking entities in offering EFT services.

It is important to all banking customers—not only to the banks—that significant technical advances such as EFT not be chilled even before their usefulness can be tested. Under the decision of the Court below, national banks would be unnecessarily prohibited from offering EFT services in some states and unnecessarily handicapped as against state banks offering EFT services in others.

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* 12 C.F.R. § 545.4-2 (1976) (Federal S&Ls); 12 C.F.R. § 721.3 (1976) (Federal credit unions).

** "Commercial banks are unique among financial institutions in that they alone are permitted by law to accept demand deposits. This distinctive power gives commercial banking a key role in the national economy. . . . Furthermore, the power to accept demand deposits makes banks the intermediaries in most financial transactions (since transfers of substantial moneys are almost always by check rather than by cash) and, concomitantly, the repositories of very substantial individual and corporate funds." *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 326 (1963).

CONCLUSION

Because the Court below has erroneously decided important Federal questions, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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